BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AKIRA GRACE	)	
Claimant	)	
	)	
VS.	)	
	)	
VALLEY VIEW PROFESSIONAL CARE CENTER	)	
Respondent	)	Docket No. 1,027,849
	)	
AND	)	
	)	
COMMERCE & INDUSTRY INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the August 13, 2008 Award by Special Administrative Law Judge Jerry Shelor (SALJ). The Board heard oral argument on November 13, 2008.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for the claimant. Richard W. Morefield, Jr., of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award, except for the claimant's discovery deposition. In addition, the parties acknowledged that the SALJ failed to consider the deposition testimony of Dan Zumalt. The parties agreed that the Board need not remand this matter, but instead go forward and consider Mr. Zumalt's testimony in addition to the balance of the record listed by the SALJ.

The parties further agreed that in the event the SALJ's determination as to timely notice is upheld on appeal, that claimant is entitled to future medical benefits upon proper application to the Director.[1]

ISSUES

After concluding the claimant gave timely notice of her work-related injury, the SALJ awarded claimant 68.86 weeks of temporary total disability (TTD) benefits followed by a 5 percent permanent partial impairment to the whole body. He denied claimant any permanent partial general (work) disability under K.S.A. 44-510e as he concluded that claimant failed to demonstrate a good faith effort to find appropriate post-injury employment or accept respondent's post-injury job offer. However, the SALJ failed to make any finding regarding claimant's post-accident wage earning ability.

Claimant requests review of this Award alleging that she is entitled to a 31 percent permanent partial general (work) disability based upon a 21 percent wage loss and a 41 percent task loss. Claimant also argues that even if the trier of fact concludes her post-injury job search was something less than earnest, she is nonetheless entitled to her actual wage loss rather than an imputed wage as the record fails to disclose what wages respondent might have paid had she accepted respondent's accommodated job offer.

Respondent argues the ALJ's Award should be reversed, thus denying claimant any compensation whatsoever as it maintains claimant failed to give timely notice of her claim. In the alternative, respondent contends the ALJ's Award should be affirmed because respondent offered claimant an accommodated job and because claimant retains the ability to earn a comparable wage.

Respondent also contends the claimant's discovery deposition should be considered part of the record at least for purposes of considering claimant's veracity. The deposition was offered at the Regular Hearing and the claimant objected. The ALJ[2] sustained that objection and although claimant was cross examined about its contents, the deposition itself was not entered into evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

---

[1] This issue was not addressed in the SALJ's Award.

[2] The Regular Hearing was conducted by then-ALJ Bryce D. Benedict.

Claimant sustained a compensable injury in December of 2005.[3] According to claimant, she immediately informed her director of nursing, Linda Hakala, that she injured her back while lifting a patient at work.[4] Although Andrew Ratzlaff, respondent's human resources director, denies any notice of an accident until January 25, 2006, Ms. Hakala never testified and contradicted claimant's assertion regarding notice.

After her injury, claimant continued working although she missed work on 3 occasions. On January 25, 2006, claimant had a meeting with Mr. Ratzlaff regarding attendance issues. According to Mr. Ratzlaff, claimant was a probationary employee and when such employees missed work 3 days for any reason, they were subject to termination. At this meeting, she was counseled about her absenteeism and at that point, claimant says she again reiterated the fact of her accident and her need for medical treatment. An accident report was filled out, but no medical treatment was offered nor received.

On February 6, 2006, claimant woke up with sharp pains in her low back. She sought treatment from the Irwin Army Hospital located in Ft. Riley, Kansas, and she was given a physician's excuse from work and told to limit any lifting over 20 pounds. In spite of the physician's excuse, claimant's employment was terminated because she missed work.

When medical treatment was not forthcoming a preliminary hearing was held. The dispositive issue at that hearing was whether claimant had given timely notice of her accident. The ALJ resolved the issue in claimant's favor and treatment was provided. Claimant was thereafter treated conservatively by Dr. Sankoorikal.

Claimant relocated to the State of Florida in August 2006 when her husband was deployed to Iraq. In November 2006, respondent offered claimant a modified job based upon restrictions imposed by a physician in Florida that was authorized to treat claimant.[5] The terms of this job are not contained within the record. But claimant did not accept that offer as she had two young children and chose to stay with family in Florida, where she considered herself a permanent resident. Claimant admits that she did not actively seek employment while in Florida until shortly before she decided to return to Ft. Riley. And while she apparently received one job offer for a CNA position, she was relocating back to Kansas and so the job was turned down.

---

[3] In spite of certain statements and arguments made in its brief, the respondent stipulated to the existence of an accident in December 2005.

[4] R.H. Trans. at 13.

[5] That same physician, Dr. Faris, also indicated claimant required an MRI and x-rays. Thus, it would appear that claimant was not yet at MMI.

In August 2007, claimant returned to Kansas when her husband returned from Iraq. Claimant eventually sought and accepted employment with a local YMCA facility where she provides daycare working 20 hours per week. This job pays $5.85 per hour and provides free child care for her kids. While claimant concedes that nothing limits her ability to work on a full-time basis, she prefers the present arrangement as it provides her with free daycare.

Claimant was evaluated by Dr. Sergio Delgado on two separate occasions, both at her lawyer's request. The first visit occurred in April 2006 during which claimant exhibited tenderness, spasm and guarding in her lower back. Following his recommendation for some diagnostic tests and physical therapy, claimant was provided with treatment with Dr. Sankoorikal. In preparation for her regular hearing claimant was again seen by Dr. Delgado on November 1, 2007. He testified that she still exhibited evidence of her injury and diagnosed chronic low back strain. Dr. Delgado assigned a 5 percent permanent partial impairment to the whole body due to her December 2005 injury.[6] He also assigned restrictions which when applied to Robert Barnett, PH.D.'s task analysis yielded a 41 percent task loss.

At respondent's request claimant was examined by Dr. John Gilbert on February 18, 2008. He concluded, after his examination, that claimant had a psychosomatic disorder and although she should adhere to a 30 pound weight restriction due to her complaints, she had a 0 percent permanent partial impairment.

In light of this restriction, Dr. Gilbert testified that claimant had a 4.7 percent task loss based on Mr. Zumalt's task analysis and a 26.5 percent task loss based on Mr. Barnett's task analysis. When asked to explain his rating and the source of his opinions, Dr. Gilbert testified that claimant's pain diagram was internally inconsistent and that, coupled with her positive Waddell findings, suggested to him that she was magnifying her symptoms and put forth less than full effort during his examination. Accordingly, he felt the 0 percent impairment was warranted.

Claimant's own vocational expert, Robert Barnett, PH.D., indicates that claimant has demonstrated a less than exuberant job search since leaving Kansas in August 2006. She has not registered with any job service offices and it would appear that the jobs she is applying for (as a CNA) are jobs that the vocational experts believe exceed her restrictions. Both Dr. Barnett and Dan Zumalt, respondent's vocational expert, testified that claimant retains the ability to earn wages ranging from $6.50 per hour (Barnett's opinion) to as much as $10 per hour (Zumalt's opinion). Even claimant concedes she is capable of doing the

[6] Delgado Depo., Ex. 3 at 4 (Nov. 1, 2007 report).

jobs identified by these individuals.[7] Nonetheless she continues to work a part-time job earning $5.85 per hour as it provides her with free daycare.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[8]

K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The SALJ concluded that claimant had met her evidentiary burden with respect to notice. The Board agrees. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.[9] Claimant testified that she provided notice to Ms. Hakala and that individual failed to testify to the contrary. Although Mr. Ratzlaff maintains respondent had no notice of claimant's injury until January 25, 2006, claimant's testimony

---

[7] The jobs included that of a receptionist, appointment scheduler and telephone sales.

[8] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[9] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978)

says otherwise. Based on this record there is no reason to disregard claimant's testimony on this issue. Although respondent has made much of what it believes is claimant's lack of veracity on a variety of issues, attempting to discredit her and defeat her assertion of notice, the Board is not so persuaded. The perceived inconsistencies which respondent points to are not so significant as to completely disregard claimant's assertion that she informed Ms. Hakala of the accident, particularly when respondent had ample opportunity to obtain and present her testimony and specifically represented to the SALJ that Ms. Hakala would be testifying in this case. Under these facts and circumstances, the Board is persuaded by claimant's contention that she informed Ms. Hakala about the accident shortly after it occurred. That portion of the SALJ's Award is, therefore, affirmed.

Turning now to the critical issue of the nature and extent of claimant's impairment, the Board finds the SALJ's Award should be affirmed although in part for different legal reasoning. The SALJ awarded claimant a 5 percent permanent partial impairment to the body as a whole. Neither party takes serious issue with this functional impairment finding and after a review of the record as a whole, the Board affirms this portion of the Award.

The SALJ went on to conclude that because he believed that claimant failed "to make a good faith effort to find employment" she should be denied a permanent partial general disability under K.S.A. 44-510e(a). This analysis is incomplete.

When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross**

> **weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[10] and *Copeland*.[11] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.[12]

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[13]

Simply put, if claimant fails to put forth a good faith effort to find post-injury employment, a wage will be imputed to him/her and the resulting wage loss, when averaged with the task loss, will yield a figure which constitutes the claimant's work disability. However, if the wage loss does not exceed 10 percent of the claimant's pre-injury average weekly wage, then no work disability is owed.

Here, the Board has no difficulty concluding that claimant failed to put forth a good faith effort to find employment post-injury. Although the record is unclear as to when claimant might reached maximum medical improvement (MMI), it appears that at least as of November 2007, when she was examined by Dr. Delgado for a second time, she was at MMI inasmuch as he rated her at that point. She may well have been at MMI while in Florida from August 2006 to August 2007, but she had seen Dr. Faris and he was recommending an MRI and x-rays. That suggests she may not yet have been at MMI.

In any event, by her own admission claimant was not making much if any effort to find employment while in Florida, turning down the one job she was offered (as a CNA).

---

[10] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[11] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[12] An analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as our Supreme Court has recently said that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland.* See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *rev. denied* (May 8, 2007); and *Graham v. Dokter*, 284 Kan. 547, 161 P.3d 695 (2007).

[13] *Copeland*, 24 Kan. App. 2d at 320.

And even when she returned to Kansas in November 2007 and was rated by Dr. Delgado, she was not making much effort to find employment. At one point when she did look she was offered but turned down a CNA position. Claimant ultimately found employment in January 2008 but only earns $5.85 an hour, working 20 hours per week.[14] The evidence within the record indicates claimant has the capacity to earn at least $6.50 an hour or as much as $10 per hour on a full-time basis.

Under these facts and circumstances, the Board finds that claimant has failed to put forth a good faith effort to find appropriate post-injury employment. Accordingly, the Board must impute a wage to her for purposes of determining the work disability under K.S.A. 44-510e(a). The Board finds, based on this record, that a wage of $7.50 per hour should be imputed to claimant. This hourly wage translates to an average weekly wage of $300 per week, a sum that exceeds 90 percent of claimant's pre-injury average weekly wage. Accordingly, claimant is not entitled to a permanent partial general impairment under K.S.A. 44-510e(a). Thus, while that portion of the SALJ's Award is affirmed, the Board has done so for a different legal reasoning.

In light of the parties' stipulations and the finding that this claim is compensable, the Award is modified to reflect that claimant is entitled to future medical treatment upon proper request to the Director.

The ALJ's finding during the Regular Hearing to exclude the claimant's discovery deposition is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated August 13, 2008, is affirmed for the reasons set forth above.

[14] This job includes free daycare and respondent suggests that the value of that benefit be added to compute her post-injury wage. If such information were available in this record, the Board believes this would have been appropriate. However, this information was not made available.

IT IS SO ORDERED.

Dated this _____ day of December 2008.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Richard W. Morefield, Jr., Attorney for Respondent and its Insurance Carrier
Jerry Shelor, Special Administrative Law Judge
Rebecca Sanders, Administrative Law Judge